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7 Attorneys for the United States of America

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,	)	Criminal Case No. 07CR3024-L
)	
11 Plaintiff,	)	DATE: FEBRUARY 4, 2008
	)	TIME: 3:00 p.m.
12 v.)	
)	
13 SALVADOR SANCHEZ-RODRIGUEZ,)	
	)	GOVERNMENT'S RESPONSE AND
14	)	OPPOSITION TO DEFENDANT'S
15	)	MOTIONS:
)	
16 Defendant.	)	(1) TO COMPEL DISCOVERY
	)	(2) FOR LEAVE TO FILE FURTHER
17	)	MOTIONS
)	
18	)	TOGETHER WITH STATEMENT OF FACTS,
	)	MEMORANDUM OF POINTS AND
19	)	AUTHORITIES AND GOVERNMENT'S
	)	MOTIONS FOR RECIPROCAL DISCOVERY
20	)	AND FINGERPRINT EXEMPLARS

21 The United States of America, by its counsel, Karen P. Hewitt,
22 United States Attorney, and Paul S. Cook, Assistant United States
23 Attorney, hereby responds to and opposes Defendants' Motions: To
24 Compel Discovery and For Leave To File Further Motions. This response
25 and opposition is based upon the files and records of the case,
26 together with the attached statement of facts and memorandum of points
27 and authorities. The Government also hereby files its motion for
28 reciprocal discovery and fingerprint exemplars.

I

STATEMENT OF FACTS

On Sunday, October 14, 2007, at 3:00 p.m., a USBP Agent patrolling the border area, approached a pick-up truck driven by a Phillip Troxtell, which had just stopped at a house on Buckman Springs Road, Campo, California. The Agent observed people trying to conceal themselves in the bed of the truck which was covered by a camper shell. Seven aliens, including the Defendant, were discovered hiding in the pick-up truck. The Agent questioned the Defendant and the other aliens, all of whom admitted to illegally entering the United States from Mexico without valid immigration documents. The Defendant admitted that he was a citizen and national of Mexico. They were all taken into custody, advised in Spanish of their administrative immigration rights per form I-826, and transported to the Tecate, California, Border Patrol Station. At the station Agents discovered that the Defendant had been convicted of a Child Molestation in the Third Degree, in Washington State on September 2, 2003, and had subsequently been ordered deported by an Immigration Judge, and removed from the United States on December 19, 2003 at San Ysidro, California.

At 8:50 p.m., Defendant was advised that his administrative rights were no longer applicable and he was advised of his Miranda rights in Spanish. The Defendant indicated he understood his rights and was willing to speak to the agents without an attorney present. In a video-taped interview, Defendant admitted that he was a citizen and national of Mexico, who had never applied for permission to re-enter the United States after his removal in December 2003. He also

1 acknowledged that he had illegally crossed the border earlier that
2 morning and was attempting to go to Washington State to work. The
3 Mexican Consulate was contacted and Defendant was allowed to speak to
4 a Consular officer.

5 II

6 **THE GOVERNMENT HAS AND WILL CONTINUE TO COMPLY WITH**
7 **ITS DISCOVERY OBLIGATIONS**

8 The United States is aware of its discovery obligations, and will
9 continue to comply with its obligations under Brady v. Maryland, 373
10 U.S. 83 (1963), the Jencks Act (18 U.S.C. §3500) and Rule 16 of the
11 Federal Rules of Criminal Procedure and will continue to comply with
12 all discovery rules. The United States has provided Defendants with
13 71 pages of discovery including the arrest reports, Defendant's
14 criminal history, relevant immigration documents, and a CD of his
15 confession. Regarding the specific requests made by the Defendant,
16 the United States responds as follows:

17 1. Rule 404(b) Evidence

18 The United States will provide Defendant with notice of its
19 intent to present evidence pursuant to Rule 404(b) three weeks before
20 trial or as otherwise ordered by the Court. The Government is unaware
21 of any such evidence at this time.

22 2. Tangible Objects

23 The Government will provide copies of or an opportunity to
24 inspect all documents and tangible things material to the defense,
25 intended for use in the Government's case in chief, or seized from
26 Defendant.

1 3. List and Addresses of Witnesses

2 The Government has provided Defendant with the investigative
3 reports relating to this crime. These reports include the names of
4 the law enforcement personnel, eye witnesses and other people
5 interviewed as part of the follow-up investigation. The Government
6 will provide Defendant with a list of all witnesses which it intends
7 to call in its case-in-chief at the time the Government's trial
8 memorandum is filed, although delivery of such list is not required.
9 See United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United
10 States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986); United States v.
11 Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not
12 entitled to the production of addresses or phone numbers of possible
13 Government witnesses. See United States v. Hicks, 103 F.3d 837, 841
14 (9th Cir. 1996)("A district court that orders the Government and the
15 defendant to exchange witness lists and summaries of anticipated
16 witness testimony in advance of trial has exceeded its authority under
17 Rule 16 of the Federal Rules of Criminal Procedure and has committed
18 error."); United States v. Thompson, 493 F.2d 305, 309 (9th Cir.1977).

19 Federal Rule of Criminal Procedure 16 does not require the
20 government (or the defense) to disclose the names and addresses of
21 witnesses pretrial. Indeed, the Advisory Committee Notes reflect that
22 the Committee rejected a proposal that would have required the parties
23 to exchange the names and addresses of their witnesses three days
24 before trial:

25 The House version of the bill provides that each party, the
26 government and the defendant, may discover the names and
27 addresses of the other party's witnesses 3 days before
28 trial. The Senate version of the bill eliminates these
provisions, thereby making the names and addresses of a

1 party's witnesses nondiscoverable. The Senate version also
2 makes a conforming change in Rule 16(d)(1). The Conference
adopts the Senate version.

3 A majority of the Conferees believe it is not in the
4 interest of the effective administration of criminal
5 justice to require that the government or the defendant be
6 forced to reveal the names and addresses of its witnesses
7 before trial. Discouragement of witnesses and improper
contact directed at influencing their testimony, were
deemed paramount concerns in the formulation of this
policy.
8 United States v. Napue, 834 F.2d 1311, 1317-19 (7th Cir. 1987)
(quoting Rule 16 advisory committee notes) (emphasis added).

9 The Government will not provide Defendants with names and
10 addresses of witnesses it does not intend to call.

11 4. Statements of Co-conspirators

12 The Government is unaware of any co-conspirators.

13 5. Expert Witnesses

14 The Government will notify Defendant of its expert witnesses,
15 such as an immigration proceedings expert and a fingerprint expert,
16 and will comply with Fed. R. Crim. P. 16(a)(1)(G).

17 6. Brady Material

18 The United States is aware of its continuing obligations under
19 Brady and its progeny. To the extent that any evidence favorable to
20 the Defendant exists, it has been provided to the Defendant.

21 7. Giglio Information

22 The Government will comply with its obligations to disclose
23 impeachment evidence under Giglio v. United States, 405 U.S. 150
24 (1972). The Government is unaware of any such material at this time.

25 8. Jencks Act Material

26 Virtually all such material has been provided to the Defendants.
27 To the extent that other material which qualifies as a statement of
28

1 the witness under the Jencks Act becomes available, it will be
2 provided to the Defendant in advance of trial.

3 **III**

4 LEAVE TO FILE FURTHER MOTIONS

5 The Government has no objection to this motion.

6 **IV**

7 THE GOVERNMENT'S MOTION FOR RECIPROCAL
8 DISCOVERY SHOULD BE GRANTED

9 The discovery provided to Defendants, at their request, includes
10 documents and objects which are discoverable under Rule 16(a)(1)(E).
11 Consequently, the Government is entitled to discover from the
12 defendant any books, papers, documents, data, photographs, tangible
13 objects, buildings or places, or copies or portions of any of these
14 items that are in Defendant's possession, custody or control and which
15 Defendant intends to use in the Defendant's case-in-chief. See Rule
16 16(b)(1)(A), Fed. R. Crim. P..

17 Fed. R. Crim. P. 26.2 requires the production of prior statements
18 of all witnesses, except Defendants'. The new rule thus provides for
19 the reciprocal production of Jencks statements. The time frame
20 established by the rule requires the statement to be provided after
21 the witness has testified, as in the Jencks Act. Therefore, the
22 United States hereby requests that Defendants be ordered to supply all
23 prior statements of defense witnesses by a reasonable date before
24 trial to be set by the Court. This order should include any form
25 these statements are memorialized in, including but not limited to,
26 tape recordings, handwritten or typed notes or reports.

V

MOTION FOR FINGERPRINT EXEMPLARS

The United States requests that the Court order that Defendant make himself available for fingerprinting by the United States' fingerprint expert. See United States v. Ortiz-Hernandez, 427 F.3d 567, 576-77 (9th Cir. 2005) (Government may have defendant fingerprinted and use criminal and immigration records in Section 1326 prosecution). Defendant's fingerprints are not testimonial evidence. See Schmerber v. California, 384 U.S. 757 (1966). Using identifying physical characteristics, such as fingerprints, does not violate Defendant's Fifth Amendment right against self-incrimination. United States v. DePalma, 414 F.2d 394, 397 (9th Cir. 1969); see also United States v. St. Onge, 676 F. Supp. 1041, 1043 (D. Mont. 1987).

VI

CONCLUSION

For the above stated reasons, the Government respectfully requests that the Defendant's motions be denied, except where unopposed, and the Government's motion for reciprocal discovery and fingerprint exemplars be granted.

Date: January 28, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/Paul S. Cook
PAUL S. COOK
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 07cr3024-L
)
Plaintiff,)
)
v.)
) CERTIFICATE OF SERVICE
SALVADOR SANCHEZ-RODRIGUEZ,)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED THAT:

I, Paul S. Cook, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Response and Opposition to Defendant's Motions on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Christian De Olivas

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 28, 2008.

s/Paul S. Cook
PAUL S. COOK